No. 79-753

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN W. HOFFMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. H-51 to H-53) is reported at 600 F. 2d 590. The final decision of the district court dismissing the action (Pet. App. E-43 to E-48) is reported unofficially at 14 Av. L. Rep. (CCH) para. 17,646.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1979, and a petition for rehearing was denied on August 16, 1979. The petition for a writ of certiorari was filed on November 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's determination that the Federal Aviation Administration's issuance of an air taxi commercial operator certificate, despite the applicant's failure to comply with the Civil Aeronautics Board's financial standards for liability insurance, was not the proximate cause of a subsequent aircraft accident.

STATEMENT

Petitioners were injured when an aircraft owned by American Aviation Company crashed on takeoff on October 28, 1970. The stipulated facts showed without dispute that the cause of the crash was pilot negligence. Subsequent to the crash, petitioners discovered that American Aviation did not have liability insurance for passengers, as required by Civil Aeronautics Board regulation 14 C.F.R. 298.41(a).[1]

After their administrative claims were denied, petitioners brought this action in the United States District Court for the Eastern District of Michigan, seeking damages under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* They alleged that the Federal Aviation Administration was negligent in issuing

[1]14 C.F.R. 298.41(a) provides:

> Each air taxi operator engaging in air transportation shall maintain in effect liability insurance coverage which complies with the requirements of this subpart and which is evidenced by a currently effective policy of insurance, with an attached standard endorsement, available for inspection by the [Civil Aeronautics] Board and the public at its principal place of business. Evidence of such insurance coverage, in the form of a certificate of insurance, shall be maintained on file at the Board at all times.

an Air Taxi Commerical Operator (ATCO) certificate to American Aviation because the company had not complied with the CAB regulation requiring liability insurance (14 C.F.R. 298.41(a)). They further alleged that the FAA's issuance of the ATCO certificate without proof of liability insurance violated the FAA's own regulation contained at 14 C.F.R. 135.15(b) (1976).[2]

The district court denied the government's motion for summary judgment based on the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h). The court held that 14 C.F.R. 135.15 "presents clear standards to be applied to fact situations in order to determine basic eligibility" and that application of the regulation therefore is a ministerial, rather than a discretionary, act (Pet. App. B-24 to B-25).[3]

After trial, the district court entered judgment for the government, finding that "the sole proximate cause of this accident was pilot negligence" and that "the FAA's failure to demand proper insurance coverage before issuing an ATCO certificate * * * was in no way connected to the cause of the later crash" (Pet. App. E-47 to E-48). The court accordingly dismissed the action

[2]14 C.F.R. 134.15(b) (1976) provided:

> To be eligible for an ATCO certificate and appropriate operations specifications a person must—
>
> * * * * *
>
> (b) Hold such economic authority as may be required by the Civil Aeronautics Board; * * *

[3]The court did not rule on the applicability of the misrepresentation exception to the Federal Tort Claims Act (28 U.S.C. 2680(h)) (Pet. App. B-7 to B-8).

without considering "the complex legal issues involving the Federal Tort Claims Act" (*id.* at E-48).

The court of appeals affirmed (Pet. App. H-51 to H-53). While acknowledging that petitioners' injury claims are for monetary losses resulting from the government's failure to require American Aviation to carry insurance, the court of appeals adopted the district court's finding that pilot negligence was the proximate cause of the crash and, hence, of petitioners' injuries (*id.* at H-52 to H-53). In dictum, the court indicated that if it had been necessary to reach the issue, it would have concluded that the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. 2680(a) and (h), also served to bar petitioners' action (*id.* at H-53).[4]

ARGUMENT

The decision of the court of appeals is correct, does not conflict with that of any other court, and does not warrant further review. The courts below resolved this case solely on the fact-bound question of proximate cause. In view of petitioners' stipulation that the American Aviation pilot was negligent in failing to check his fuel supply and in overloading the aircraft prior to takeoff, petitioners cannot seriously claim that the physical injuries they sustained as a result of the crash were in any sense "caused" by the government.

[4]The district court dismissed the suit of petitioner Fischer on the ground that his administrative claim was not timely filed (Pet. App. D-39 to D-42). Petitioner Fischer appealed the dismissal to the court of appeals, and the government moved to dismiss the appeal. The motion was referred to the hearing panel (Pet. App. G-50). Although the court of appeals did not expressly address petitioner Fischer's appeal, its decision on the merits effectively disposes of his damages claim.

By characterizing the harm they suffered as a "loss of property" arising from the FAA's failure to require insurance before issuing an ATCO certificate to American Aviation, petitioners nevertheless contend (Pet. 16-19) that they are entitled to recover damages from the government. But, as both lower courts correctly perceived in rejecting this claim, petitioners' "loss of property" was due to the crash, and thus it is the cause of the crash that is determinative of liability. See *Bristow* v. *United States*, 309 F. 2d 465 (6th Cir. 1962). Under the applicable state law, the law of Michigan, "[t]here can be no recovery for an injury that is not a proximate consequence of the negligence complained of; the court cannot select some cause back of the proximate one whereon to base an action." *Minneapolis Fire & Marine Ins. Co.* v. *Porter*, 328 Mich. 11, 18, 43 N.W. 2d 46, 49 (1950). Moreover, to the extent that the decisions below rest upon a determination of causation in fact (see *Moning* v. *Alfono*, 400 Mich. 425, 438, 254 N.W. 2d 759, 765 (1977)), there is no reason for the Court to deviate from its settled practice not to disturb a fact finding concurred in by two lower courts. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 636 (1967); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Petitioners' remaining contentions are without merit. The authority of the FAA to issue ATCO certificates without proof of insurance (Pet. 12-16) was not considered by the district court, and resolution of the issue was not necessary to its decision or to the decision of the court of appeals. Therefore, the court of appeals' statement (Pet. App. H-53) that the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act would also bar petitioners' action provides no basis for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1980